Supreme Court, U.S.
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NO. 91-1665

In the Supreme Court of the United States

OCTOBER TERM, 1991

CHARLA GATES CANNON,
Petitioner,

versus

COMMISSIONER OF INTERNAL REVENUE,
Respondent

REPLY BRIEF FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

The litigants in this income tax case tried and briefed the case in the issues of whether the stipulated expenses were deductible as business expenses or for the production of income. The Tax Court disallowed the expenses on the ground they were hobby losses. The Tenth Circuit affirmed. The questions presented are:

> Was it reversible error to sua sponte construe the hobby loss provisions in pari materia with those involving business expenses?
>
> Should the case be remanded to the Tax Court to afford petitioner the opportunity to offer evidence on the hobby loss issue?

Argument

On brief respondent asserts the decision of the court of appeals does not conflict with any decision of this court or of any court of appeals. Respondent does not discuss nor distinguish, nor in fact even mention, the decisions of the Eighth, Third, Ninth, and Fourth Circuits requiring "fair notice" to the taxpayer, cited and discussed on pages 6 and 7 of Petitioners Writ of Certiorari, nor the statutory limitation in Section 183(c) that the hobby loss provisions therein are not applicable if Sections 162 or 212 are.

It is undisputed that the factors under Section 183 can be applied to determine a profit motive under other sections of the Internal Revenue Code. The issue is whether the Tax Court can do so sua sponte without notice to the parties. In its opinion the Tenth Circuit expressly acknowledged that Section 183 was not considered by the litigants.

Respondent does allege that the provisions of Section 183 and the Regulations thereunder may properly be utilized sua sponte in resolving the existence of a profit motive under Section 162 and 212, citing several cases. However, in each case the applicability of Section 183 was litigated in the trial court with the consent of the parties. There was no surprise. Each of the cited cases are discussed in the appendix.

It is respectfully submitted that this case should be reversed or at a minimum remanded to provide petitioner her day in court to respond to the provisions of Section 183 or any statute the Commissioner would assert, perhaps by summary reversal.

Respectfully submitted,

TOWNER SHIELDS LEEPER

APPENDIX

Agro Science Co. v. Commissioner, 934 F.2d 573 (5th Cir.) cert. denied, 112 S. Ct. 300 (1991), affirming T.C. Memo 89,687 which denied deductions for research and development expenses under Section 174. The parties at trial applied the standards of Regulations under 183. Surprise was not an issue at either the trial or appellate level.

In *Antonides v. Commissioner,* 893 F.2d 656 (4th Cir. 1990) affirming 91 T.C. 686 the applicability of Section 183 was expressly raised and addresed by the litigants in the trial court.

In *Benz v. Commissioner,* 63 T.C. 375 (1974) Section 183 was expressly addressed by the parties and the trial court.

In *Brannen v. Commissioner,* (11th Cir. 1984) 722 F.2d 695, 53 AFTR 2d 84-579, affirming (1982) 78 T.C. 471 (Full Tax Court Opinion) the applicability of Section 183 was expressly raised in respondent's notice of deficiency and litigated by the parties.

Carkhuff v. Commissioner, 425 F.2d 1400 (6th cir. 1970) involved taxable years prior to the enactment of Section 183. Surprise was not at issue.

Commissioner v. Groetzinger, 480 U.S. 23 (1987) involving the issue of whether a full time gambler's income was a trade or business. Neither Section 183 nor surprise was at issue.

In *Dreicer v. Commissioner,* (Ct. of Appeals, D.C. 1981) 665 F.2d 1292, 48 AFTR 2d 81-5884, reversing and remanding (1979) T.C. Memo 79-395, Section 183 was ex-

pressly raised and litigated by the parties. The appellate court reversed for the provisions of Section 183 did not require a "bona fide expectation of profit."

In *Fauconer v. Commissioner,* (4th Cir. 1984) 748 F.2d 890, 55 AFTR 85-302, reversing (1983) T.C. Memo 83,165, the sole and expressed issue litigated by the parties was Section 183.

In *Hayden v. Commissioner,* 889 F.2d 1548 (6th Cir. 1989) affirming T.C. Memo 88,310, Section 183 was addressed by the parties and the trial court. No surprise was at issue.

In *Independent Elec. Supply, Inc. v. Commissioner* (9th Cir. 1986) 781 F.2d 724, 57 AFTR 2d 86-665, affirming sub nom Paul Lahr (1984) T.C. Memo 1984-472, the taxpayer expressly relied on Section 183 and unsuccessfully argued he had carried his burden of proof.

In *Nickerson v. Commissioner,* 700 F.2d 402 (7th Cir. 1983) reversing T.C. Memo 81,321 the sole issue litigated was Section 183.

In *Tallal v. Commissioner,* 778 F.2d 275 (5th Cir. 1985) the sole issue releated to Section 162. Neither Section 183 nor surprise was at issue.

Thomas v. Commissioner, 792 F.2d 1256 (4th Cir. 1986) affirming 84 T.C. 1244 which denied mining expenses under Section 616. Section 183 was not involved at the trial nor appellate level.

Wrightsman v. United States, 428 F.2d 1316 (Ct. Cl. 1970) involved years prior to the enactment of Section 183 which was not considered.